Perspectives from the Dentons Global Restructuring, Insolvency and Bankruptcy Team

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1. Introduction

In September 2017, the Dentons Global Restructuring, Insolvency and Bankruptcy (RIB) Team put together a series of seminars for our financial institution clients to share practical perspectives on the insolvency law reforms in Singapore which were largely inspired by Chapter 11 proceedings under the US Bankruptcy Code. Our global panel, comprising partners from the Chicago, New York, London, Australia and Singapore offices, shared their expert views on what Singapore lenders can expect going forward in view of Singapore's insolvency law reforms and enactment of the UNCITRAL Model Law on Cross-Border Insolvency (Model Law).

18 months later, the Dentons Global RIB Team came together once again to host our financial institution clients and insolvency practitioners for a 1-day seminar on 5 April 2019. 21 Dentons lawyers from 12 jurisdictions (USA, UK, Germany, Australia, Canada, Germany, France, Indonesia, Singapore, Czech Republic, the Netherlands, and Luxembourg) and two esteemed guest speakers from Deutsche Bank and Burford Capital were present to share their views and insights on a variety of hot button topics relevant to the modern lender. These include:

a. restrictions to *ipso facto* clauses,
b. rescue financing and insolvency litigation funding,
c. the interplay between insolvency and cryptocurrency,
d. shifts in centre of main interests (COMI),
e. durability of the rule in *Gibbs* in the UK,
f. overcoming challenges in enforcement in Indonesia, and
g. contributors to global uncertainty – Brexit and Trump.

We provide a snapshot of the day's discussions on *ipso facto* clauses, rescue financing, insolvency and cryptocurrency, and COMI shifts.

2. Restrictions to *ipso facto* clauses – Clause 440 of the Insolvency, Restructuring and Dissolution Act 2018 (passed but not yet in force)

On 1 October 2018, the Singapore Parliament passed the Insolvency, Restructuring and Dissolution Act 2018 (the Omnibus Act), which is expected to come into force sometime in 2019. The Omnibus Act consolidates Singapore's existing corporate and personal insolvency and debt restructuring laws into a single piece of legislation, and also seeks to enhance Singapore's insolvency and debt restructuring schemes. The Omnibus Act will include existing provisions on the Model Law, and Chapter 11-inspired reforms which are currently in force under the Companies Act (including provisions on automatic moratorium, super priority rescue financing, cram-downs, pre-pack schemes, etc.). Of particular note to lenders, is that the Omnibus Act will introduce restrictions to *ipso facto* clauses (see Section 440 of the Omnibus Act) – this is new to Singapore law.

Ipso facto is a Latin phrase which translates to "without more". In the insolvency and restructuring context, *ipso facto* clauses refers to clauses which permit one contracting party to terminate, modify and/or accelerate agreements/obligations simply upon the other contracting party's insolvency or occurrence of an insolvency-related proceeding (e.g. applications for moratorium, judicial management, schemes of arrangement).

Once Section 440 of the Omnibus Act is in force, this will restrict the enforceability and operation of such *ipso facto* clauses. In real terms, this means that lenders cannot terminate, modify, or accelerate facility agreements simply based on the borrower's insolvency or the occurrence of insolvency-related proceedings involving the borrower.

However, all is not lost for the concerned lender. Parties who wish to enforce *ipso facto* clauses can still do so with leave of Court. The requirement under Section 440 is that the party must demonstrate that it will be under "*significant financial hardship*" if required to continue with the contract. What does "*significant financial hardship*" mean? Singapore may have to look to Canada for guidance as a similar phrase features in the equivalent provision of the Canadian Companies Creditors Arrangement Act. Our Canadian partner shared that in Canada, this constitutes a high threshold and may in some cases refer to the party's own financial peril if forced to continue with the contract.

Restrictions on *ipso facto* clauses also do not necessarily mean that a lender is stuck in an unhappy contract. *Ipso facto* clauses aside, lenders are still permitted to exercise their termination rights based on other events of default (e.g. payment default, breach of financial covenants and ratios). Our German, American, and Australian partners shared experiences from their home jurisdictions on restrictions against *ipso facto* clauses. Indeed, the restriction on *ipso facto* clauses may actually help distressed debtors preserve valuable trade agreements and promote the rehabilitation of the distressed debtor on a going concern basis, which may mean more positive recoveries for lenders.

It remains to be seen how the Singapore Courts and lenders will deal with restrictions to *ipso facto* clauses once the Omnibus Act comes into force. **Watch this space!**

3. The landscape for rescue financing

Our guest speakers from Deutsche Bank and Burford Capital along with our US and Australian partners were on hand to share their perspectives and experiences dealing with rescue financing and insolvency litigation funding. This section focuses on the former.

At the time of writing, the sole reported decision on super priority rescue financing related to an unsuccessful application arising from the distressed company's failure to satisfy the Court that reasonable attempts were made at sourcing for rescue financing on a non-super priority basis. (For more information on this case, please click here to read our client update on *Re: Attilan Group Ltd* [2017] SGHC 283.)

Notwithstanding the outcome in *Re: Attilan Group Ltd*, there is nevertheless strong interest for rescue financing in Singapore among new players and existing creditors alike. Some lenders see it as an investment opportunity with quick and profitable returns. The addition of potential new lenders in the mix often stirs interest in existing lenders about the possibility of rescue financing. However, most existing lenders remain understandably cautious about putting in further funds in addition to the funds which are already in peril. Ultimately, the company must be able to lay out a credible plan for recovery which is able to inspire confidence in new and/or existing lenders. However, rescue financing should be seen as a possible bridge to tide over a company tight on working capital so that once it gets out of the trying period, it can better generate good revenue and hopefully a better outcome for lenders. Rescue financing is certainly an area that is ripe for further development and indeed, the Singapore Court has very recently allowed an application for super priority rescue financing in the restructuring of Asiatravel.com Holdings Limited.

4. Cryptocurrency in insolvency

Cryptocurrency has been the talk of the town since 2017 and was in some quarters regarded the asset of the future. Since then however, there has been a spectacular crash in the value of cryptocurrency and alongside it, insolvency-related issues have arisen.

An unresolved issue of which there is no global consensus is this – what is the nature of cryptocurrency? Unfortunately, different jurisdictions take varying approaches. Some jurisdictions regard cryptocurrency as having the characteristics of property (e.g. USA and Singapore – for our client update on *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03 due to be published soon), some regard it as a commodity (e.g. Canada), and some have not yet ascribed any meaningful view to the legal nature of cryptocurrency. Until such time when this issue is resolved, cross-border insolvency involving cryptocurrencies will remain complicated.

A further source of complication is the fact that cryptocurrency is not homogenous. Some cryptocurrency tokens are traded as currency, but some cryptocurrency take the form of utility tokens in that they confer a right to holders to use a service or to consume certain products developed by the issuing company and deposited on the blockchain. Therefore, in considering the nature of cryptocurrency, there must also be an appreciation of the nature and right conferred on holders of that particular cryptocurrency token.

How is cryptocurrency relevant to lenders? We can appreciate that most lenders will hesitate to accept cryptocurrency as security or to receive payment in the form of cryptocurrency tokens. Indeed, no lender in the room on 5 April 2019 has taken cryptocurrency as collateral.

For insolvency practitioners, it can be a good source of real world monies to be realised to pay off unsecured creditors. Again, no insolvency practitioner in the room on 5 April 2019 has considered the likelihood of realising cryptocurrency to pay off debts of the company.

But why not? (Please click here to access our client update on the issue of whether cryptocurrency can be collateralised.)

Lenders may unknowingly already hold security over cryptocurrency as part of the debtor's general assets under a floating charge. This is especially true of start-up companies, tech companies and millennial-focused retailers which are more receptive to the use of cryptocurrency as a form of payment or the purchase of cryptocurrency as a form of investment.

Therefore, lenders should consider having in place systems and processes to potentially deal with the realisation of cryptocurrency. For example, the lessons learnt from the ongoing Quadriga saga (where millions in cryptocurrencies stored in cold wallets remain inaccessible following its founder's death) demonstrate that lenders may wish to consider ways of ensuring that cold wallets held by debtors remain accessible by them in an enforcement situation.

Cryptocurrency remains a developing area of insolvency law and is expected to play a more significant role in restructuring and insolvency in the years to come.

5. Shifts in COMI – a look at *Re Zetta Jet* and the Noble restructuring

COMI is shorthand for "centre of main interests" and is one of the key considerations for determining the location of the primary insolvency / restructuring proceedings. Upon the identification of the primary insolvency / restructuring proceedings, proceedings in other jurisdictions are considered secondary and recognition applications may be filed in those jurisdictions in aid of the primary proceedings.

As a starting point, the registered office of the debtor is presumed to be the COMI however, this is rebuttable by factors which may suggest otherwise such as the location of the debtor's principal accounts, the principal location of the debtors, the location of the books and records of the debtor, the place where commercial policies are determined etc.

While COMI is a commonly used term in the insolvency and restructuring circle, the determination of COMI remains varied, especially as regards the timing of when COMI is decided. The Singapore High Court decided in *Re Zetta Jet* [2019] SGHC 53 to follow the US position and held that COMI is determined as at the date of filing of the recognition application. (This represented a departure from the European, English and Australian approaches.) However, where Singapore and the US differed was that unlike the US, the place of existing insolvency / restructuring activities would not feature in the Singapore Court's consideration of COMI.

Another dimension to COMI is that it can be shifted especially where the debtor and creditors agree and if the shift is intended to legitimately further the success of the restructuring. For example, following an agreement between Noble Group Limited and its senior creditors, steps were taken to shift Noble's COMI from Hong Kong to England. While the reasons for the shift were not explained in the English Court's judgment (approving the scheme of arrangement), one possible key reason was the Singapore Exchange's refusal to allow Noble to continue its listing status as a new restructured entity which was a key pillar of its original plans for restructuring. Noble's fall-back plan was therefore to put the company through the administration process in England (which necessitated COMI being located in England) and to do a pre-pack sale of its assets into a new company which would be mostly owned by the creditors through a debt-for-equity swap.

Our Luxembourg partner also shared that it is normal for companies incorporated in Luxembourg (intending to undergo a restructuring) to shift COMI elsewhere since Luxembourg has no laws on restructuring.

Lenders with English law-governed debts should also bear in mind the enduring English rule in *Gibbs* when grappling with COMI and COMI shifts for purposes of cross-border restructuring. At present, the English courts maintain the principle that the discharge of a debt can only take place in the country of the law governing the debt. The rule in *Gibbs* goes against the tide of universalism in cross-border insolvency but at the same time promotes sanctity of contract as it recognises the significance placed upon the law chosen by the parties to govern the debt. In practical terms, this means that any cross-border restructuring involving assets located in England will have to consider the need to commence parallel restructuring proceedings in the country of the law governing the debt. The rule in *Gibbs* was recently affirmed in the case of *Gunel Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWCA Civ 2802 but it is understood at the time of writing that leave is being sought from the UK Supreme Court to challenge the outcome in *Sberbank* and along with it, the rule in *Gibbs*.

The Singapore High Court has not adopted the rule in *Gibbs* (*Re Pacific Andes Resources Development Ltd and other matters* [2018] 5 SLR 125). Instead, the Singapore Court has adopted a reformulation of the rule in *Gibbs* and has held that "*if one of the parties to a contract was the subject of insolvency proceedings in a jurisdiction with which he had an established connection, it should be recognised that the possibility of such proceedings would have entered into the parties' reasonable expectations in entering their relationship, and as such might furnish a ground for the discharge to take effect under the applicable law*".

As insolvency and restructuring proceedings continue to become increasingly cross-border, the identification of COMI is crucial and COMI shifts will be more commonplace and lenders must be prepared to address such issues.

6. Conclusion

The Dentons Global RIB Team will continue organising future seminars on cutting edge insolvency and restructuring issues and to keep a finger on the pulse of the legal developments around the world. We are looking to expand further into more jurisdictions within ASEAN, America and the Caribbean in order to provide a seamless service for clients and to remain nimble and fleet-footed in dealing with an increasingly cross-border world. Should you wish to join us for our next session, please write to sg.academy@dentons.com so that we may include you in our mailing list.

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